1992

Arthur Mintz, Trustee of the Mintz Family Turst v. Marc Development, and Illinois corporation : Brief of Appellee

Utah Court of Appeals

BRIEF

10
DOCKET NO. 920571

IN THE UTAH COURT OF APPEALS

ARTHUR MINTZ, Trustee of the Mintz Family Trust, Petitioner-Appellee, vs. MARC DEVELOPMENT, an Illinois corporation, Respondent-Appellant.	**Case No. 920571-CA** Priority 16

APPELLEE'S BRIEF

APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT
OF SUMMIT COUNTY, STATE OF UTAH
THE HONORABLE HOMER F. WILKINSON
DISTRICT JUDGE PRESIDING

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APPELLEE'S STATEMENT OF DISPOSITIVE STATUTES AND RULES

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DETERMINATIVE STATUTES

Utah Code Ann. § 78-31-12. **Confirmation of award.**

Upon motion to the court by any party to the arbitration proceeding for the confirmation of the award, and 20 days notice to all parties, the court shall confirm the award unless a motion is timely filed to vacate or modify the award.

Utah Code Ann. § 78-31a-14. **Vacation of the award by court.**

(1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

(a) the award was procured by corruption, fraud, or other undue means;

(b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;

(c) the arbitrators exceeded their powers;

(d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of a party; or

(e) there was no arbitration agreement between the parties to the arbitration proceeding.

(2) A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party, or if predicated upon corruption, fraud, or other undue means, within 20 days after the grounds are known or should have been known.

(3) If an award is vacated on grounds other than in Subsection (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the arbitration agreement or by the court. Arbitrators chosen by the court shall be found qualified to arbitrate the issues involved. The time for making an award, if specified in the arbitration agreement, is applicable to a rearbitration proceedings. If not specified, the court shall order the award upon rearbitration to be made within a reasonable time. The time for making an award under a rearbitration proceeding commences on the date of the court's order for rearbitration.

(4) If the motion to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

DETERMINATIVE COURT RULE

Rule 4-501 Code of Judicial Administration.

(3) **Hearings.**

(a) A decision on a motion shall be rendered without a hearing unless ordered by the Court, or requested by the parties as provided in paragraphs 3(b) or (4) below.

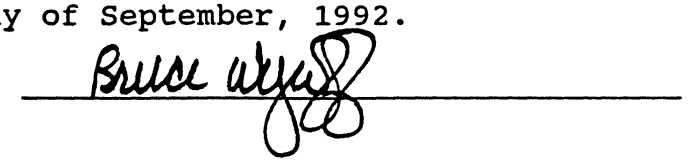
(b) In cases where the granting of a motion would dispose of the action or any issues in the action on the merits with prejudice, either party at the time of filing the principal memorandum in support of or in opposition to a motion may file a written request for hearing.

* * * *

(f) If no written request for a hearing is made at the time the parties file their principal memoranda, a hearing on the motion shall be deemed waived.

CERTIFICATE OF SERVICE

I hereby certify that I hand-delivered four true and correct copies of **APPELLEE'S STATEMENT OF DISPOSITIVE STATUTES AND RULES** to Mr. Thomas T. Billings and Mr. Jon E. Waddoups, VanCott, Bagley, Cornwall & McCarthy, 50 South Main Street, Suite 1600, Salt Lake City, Utah 84145 this 30th day of September, 1992.



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II. JURISDICTIONAL STATEMENT

The Order that is the subject of this appeal is a final order and judgment of the Third Judicial District Court of Summit County. The Utah Court of Appeals has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2a-3(2)(k). Pursuant to Utah R. App. P. 42 the Utah Supreme Court transferred this appeal to the Court of Appeals for disposition by order dated August 26, 1992.

III. STATEMENT OF ISSUES PRESENTED ON APPEAL, AND STANDARD OF APPELLATE REVIEW

A. Did Appellant waive its rights to challenge the arbitration award the trial court confirmed?

Because the resolution of this issue involves the review of written materials only, this Court reviews the evidence de novo. Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988).

B. Should this Court summarily affirm the trial court because Appellant failed to marshal evidence in its brief?

Because this issue involves the contents of an appellate brief, this Court addresses it for the first time, and as a matter of discretion. Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1185 (Utah App. 1987).

C. Should this Court summarily affirm the trial court because Appellant failed to comply with Utah R. App. P. 24(a)?

Because this issue involves the contents of an appellate brief, this Court addresses it for the first time, and as a matter of discretion. Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1185 (Utah App. 1987).

D. Did the trial court err in concluding there was no competent evidence of fraud before it?

Because the resolution of this issue involves the review of written materials only, this Court reviews the evidence de novo. Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988).

E. Did the trial court err in refusing to reconsider the damages the Arbitrator awarded Appellee?

This Court reviews the trial court's interpretation of statutes such as the Utah Arbitration Act as a question of law. Western Fiberglass, Inc. v. Kirton, McConkie & Bushnell, 789 P.2d 34, 37 (Utah App. 1990). Neither this Court or the trial court can, however, review the merits of the underlying arbitration award the trial court confirmed. City of Fairbanks Mun. Util. System v. Lees, 705 P.2d 457, 460 (Alas. 1985); Arizona Public Serv. Co. v. Mountain States Tel. & Tel. Co., 149 Ariz. 239, 717 P.2d 918, 922-23 (App. 1985); Foust v. Aetna Cas. & Ins. Co., 786 P.2d 450, 451

(Colo. App. 1989); Harris v. Haught, 435 So.2d 926, 928 (Fla. App. 1983); Jackson Trak Group v. Mid States Port Auth., 242 Kan. 683, 751 P.2d 122, 127 (1988); Taunton Mun. Light Plant Comm'n v. Geiringer & Assoc., 560 F.Supp. 1249, 1252 (D. Mass.), aff'd. 725 F.2d 664 (1st Cir. 1983)(applying Massachusetts codification of Uniform Arbitration Act); Byron Center Public Schools v. Kent County Educ. Ass'n., 186 Mich. App. 29, 463 N.W.2d 112, 113 (App. 1990); Beebout v. St. Paul Fire & Marine Ins. Co., 365 N.W.2d 271, 273 (Minn. App. 1985); Holman v. Trans World Airlines, 737 F.Supp. 527, 530 (E.D. Mo. 1989)(applying Missouri codification of Uniform Arbitration Act); Glasgow Educ. Ass'n. v. Board of Trustees, Valley County, 242 Mont. 478, 791 P.2d 1367, 1371 (1990); Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, 45 (App.) disc. review denied, 317 N.C. 714, 347 S.E.2d 457 (1986); Greater Johnstown Area Vocational-Technical School v. Greater Johnstown Area Vocational-Technical Educ. Ass'n., 88 Pa. Commonwealth Ct. 141, 489 A.2d 945, 948 n.4 (1985).

F. Did the trial court err in ruling the election of remedies doctrine is inapplicable to this matter?

Because the resolution of this issue involves the review of written materials only, this Court reviews the evidence de novo. Matter of Adoption of Infant Anonymous, 760 P.2d 916, 918 (Utah App. 1988).

IV. STATEMENT OF THE CASE

A. NATURE OF THE CASE.

Petitioner/Appellee Arthur Mintz, Trustee of the Mintz Family Trust ("Trust"), filed his Verified Petition for Confirmation of Arbitration Award (the "Petition") on October 10, 1991. In the Petition, Trust requested confirmation of a May 30, 1991 arbitration award (the "Award") against Respondent/Appellant Marc Development ("Development"). The amount of the Award is $188,500, plus interest from March 28, 1991. Development never sought to vacate the May 30, 1991 Award until it filed its November 21, 1991 Reply to Trust's Petition.

B. COURSE OF PROCEEDINGS.

On January 16, 1992 Trust filed its Motion for Judgment on the Pleadings (the "Motion"). (R. 19-20). After the parties fully briefed the Motion (R. 22-30; 36-64; 80-106), Trust filed its Notice to Submit Motion for Decision (R. 120-21). Trust concurrently filed its Affidavit of Attorney Fees. (R. 107-14).

After the parties filed all memoranda and the Notice to Submit, Development filed an untimely Request for Oral Argument. (R. 115-16). Trust objected to that request and moved to strike it. (R. 117-19). The trial court granted Trust's Motion without a hearing. (R. 122). It awarded Trust its attorneys' fees, subject to Development's objection and the court's review. (R. 122).

Pursuant to the trial court's ruling, Trust filed a proposed Order and Judgment and served it on opposing counsel. (R. 155). Development objected to that proposed order and judgment (R.128-41), and requested oral argument on its objection. (R. 126-27). Trust filed its response to Development's objection (R. 142-48), and objected to Development's request for oral argument on its objection. (R. 149-50).

C. DISPOSITION AT TRIAL COURT.

The trial court overruled Development's objections to the Order and Judgment (R. 152), and executed it. (R. 153-56)[1]. A copy of the trial court's Order and Judgment appears herein as Exhibit "A" to the Addendum.

V. STATEMENT OF RELEVANT FACTS

On or about June 23, 1989 Trust and Development entered into a written contract for Trust to purchase from Development real property in Summit County known as Lot 37, Bald Eagle Club. (R.1, 14). As part of that contract, Trust and Development entered into a Letter of Guarantee (R.5, 6, 50-51, 136-37) memorializing the

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[1]Trust also filed its Motion for Review and Award of Attorney Fees. (R. 123-25). Development did not object to the attorney's fees sought by Trust. The trial court awarded Trust's attorneys' fees as prayed (R. 152), and executed an Order and Supplemental Judgment awarding Trust its attorneys' fees in the amount of $5,351.96. (R. 157-60). Development does not appeal that Order and Supplemental Judgment or the trial court's award of Trust's attorneys' fees.

parties' rights and obligations to each other. (R. 2-3, 14). A copy of that Letter of Guarantee appears herein as Exhibit "B" to the Addendum.

As relevant to the issues involved in this appeal, the Letter of Guarantee provided:

> 4. In addition, you [Trust] shall be guaranteed herein the following at the end of 20 months from the date of closing:
>
> 1. The lot shall be deemed to be worth 10% above the original published price in Exhibit A by virtue of the following:
>
> a. Purchaser shall build or keep said lot.
>
> b. Seller shall have the obligation and option to pay the difference between Buyer's sale price at that time and the 10% increase price as indicated below, or,
>
> c. At the Seller's option, Seller shall be obligated to purchase the lot for said amount of the guarantee indicated below,
>
> Original Price List Exhibit A for Lot #37 is $535,000.00
>
> Final Special Discount Price: $442,200.00
>
> Guaranteed Price at the end of 20 months: $588,500.00
>
> In order to guarantee that funds shall be available to support the above guarantees, Seller hereby agrees to deed into escrow with High Country Title Company, the deeds to four Bald Eagle Homesites free and clear of all encumbrances to inure to the benefit of the Buyers, the payment of said guarantees. These homesites shall be transferable and

> nonexlusive [sic] so that a minimum of four homesites shall always remain in escrow throughout the 20 month period.

(R. 5-6, 50-51, 136-37).

As required by the Letter of Guarantee, Development placed four other Bald Eagle Club lots--11,12,18 and 19--in escrow with High Country Title Company, Park City, Utah. (R. 60-62). A copy of the Deposit in Escrow appears herein as Exhibit "C" to the Addendum. The Deposit in Escrow provided that those four lots would remain in escrow for 36 months, or until the conclusion of any pending litigation, to provide security for purchasers' rights under various guarantees executed by Development. (R. 61, Exhibit "C" to Addendum). The Deposit in Escrow specifically designated Trust as a beneficiary. (R. 60, Exhibit "C" to Addendum).

Trust determined not to keep or build on Lot 37 and tried to sell the lot. It received an offer of $400,000.00, and gave notice to Development on March 18, 1991 either to pay the difference ($188,500.00) or to repurchase the lot for $588,500.00. (R. 53). Those were the two options available to Development under the Letter of Guarantee. Development refused, claiming the offer was inadequate, and that it accordingly would not repurchase the lot for $588,500.00. Development insisted that Trust must sell Lot 37 for a more substantial price, use a real estate broker, pay the broker's commission, and receive no interest on its funds until it

sold Lot 37. Only then would Development agree to pay the difference between the gross sales price received by Trust and $588,500.00. (R. 53).

Trust contended this was not the intention of the parties, not its understanding, and not an accurate interpretation of the Letter of Guarantee. Trust and Development could not resolve their differences concerning Development's obligations under the Letter of Guarantee. Consequently, Trust and Development designated Gregory S. Bell, Esq. of Salt Lake City to arbitrate the dispute. (R. 2, 15). Mr. Bell (the "Arbitrator") conducted an arbitration hearing where he took testimony and heard argument (the "Hearing") on May 17, 1991. (R. 2, 15).

Before the arbitration, Trust and Development filed their respective summaries of the dispute to be arbitrated. (R. 53, 55-56). In particular, the parties fully empowered the Arbitrator to determine "(a) whether the offer submitted by [Trust] in the sum of $400,000 was a bona fide offer establishing the fair market value [of Lot 37] and, (b) who was to bear the costs of sale of the property." (R. 40). Development argued throughout the arbitration process that the $400,000.00 figure was too low. Trust requested "a decision instructing [Development] to either accept the sales price and pay $188,500.00, plus reasonable interest to the date of

payment, or, in the alternative, to pay $588,500.00 and repurchase the tendered lot." (R. 53).

The Arbitrator issued his award on May 23, 1991. (R. 99). The American Arbitration Association ("AAA") mailed copies to the parties that day. (R. 98). In this award the Arbitrator (1) determined the fair market value of Lot 37 to be $400,000.00; (2) ordered Development to pay Trust $188,800[2], plus interest at 10% from March 28, 1991 until paid; (3) gave Development the alternative until May 30, 1991 of purchasing Lot 37 for $588,800[3] in cash; (4) required each party to pay customary closing costs if Development elected the repurchase option; (5) determined that Trust was not responsible for paying the real estate commission.

Development did not meet the Arbitrator's May 30, 1991 deadline for repurchasing Lot 37. Development requested Trust to give Development a 45-day extension--until July 15, 1991--to purchase Lot 37 for $588,500. (R. 104). As an inducement to Trust to grant it this extension while forbearing from trying to collect on the Award, Development agreed to pay Trust interest "at the rate

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[2]Seven days later the Arbitrator issued, and the AAA mailed, his Amended Award (the "Award"). (R. 100-01). The Award was identical to the initial award except for the reduction of the award amount from $188,800 to $188,500. A copy of the Award appears herein as Exhibit "D" to the Addendum.

[3]This amount was reduced by $300 to $588,500 in the Award. This reduction is explained in footnote 2, supra.

of 2 points over Harris Bank of Chicago's prime rate," rather than the 10% the Arbitrator awarded. (R. 104). A copy of this May 29, 1991 extension appears herein as Exhibit "E" to the Addendum.

Development did not exercise its extension on or before July 15, 1991. Consequently, Trust began efforts to enforce the Award. On July 16, 1991 Trust sent Development a Notice of Default and Breach of Agreement (the "Notice"). (R. 64). Trust advised Development in the Notice that Trust had requested High Country Title, the escrow agent under Development's Deposit in Escrow (R. 60-62; Exhibit "C" to Addendum), to sell the four escrowed lots (lots 11, 12, 18 and 19), and to pay Trust $188,500, plus awarded interest, from the sale proceeds. A copy of the Notice appears herein as Exhibit "F" to the Addendum.

On October 10, 1991 Trust filed its Verified Petition for Confirmation of Arbitration Award. (R. 1-7). Development raised no objection to the Award until November 21, 1991, when it filed its Answer to the Petition. (R. 14-17).

VI. SUMMARY OF ARGUMENT

A. Development has waived its right to challenge the Award on any grounds. It has not marshaled any evidence as appellate rules require. It has not presented any legal argument on some issues. It has raised an issue not included in its docketing statement. This waiver and these failures to comply with

appellate rules justify summary affirmance of the trial court without reaching the issues Development raises.

B. Development filed with the trial court an affidavit rife with hearsay, foundationless assertions, and unsubstantiated opinions. Trust timely objected to that affidavit. The trial court properly refused to consider the portions of that affidavit to which Trust objected. This Court should affirm the trial court's Order and Judgment because the record utterly lacks any competent evidence that Trust procured the Award through fraud.

C. A trial court can vacate an arbitration award only on the grounds contained in applicable arbitration statutes. The Utah Arbitration Act does not permit the judicial review of damages requested by Development.

D. The Deposit in Escrow secured buyers such as Trust in the event Development defaulted on obligations arising from Development's various guarantees. In the Award the Arbitrator ruled that, pursuant to the Letter of Guarantee, Development owed Trust $188,500 plus interest. Trust's efforts to satisfy the Award from the escrowed property is not an election of remedies, unless judicial enforcement of the Award permits a double recovery. Confirmation of the Award will <u>not</u> create a double recovery.

VII. ARGUMENT

A. DEVELOPMENT WAIVED ITS RIGHTS TO CHALLENGE THE AWARD; ITS ATTEMPTS ARE ABSOLUTELY BARRED.

Utah Code Ann. § 78-31a-14(2) unambiguously provides: "A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party. . ." (emphasis added). The Arbitrator served his Award on Development on May 30, 1991. AAA Rule 45 (R. 102, p. 19) defines delivery as occurring upon mailing. Accordingly, Development had to file any motion to vacate the Award not later than June 19, 1991. Development did not do so until more than five months after that deadline. (R. 14). Consequently, it is absolutely barred from contesting Trust's Petition for Confirmation.

Trust argued to the trial court the untimeliness of Development's effort to contest the Award. (R. 24-28, 85). Development does not claim on appeal that its effort to vacate the Award was timely.[4]

When a party to an arbitration such as Development fails to move to vacate an award within the time limit prescribed by the statute, that party has waived its right to challenge the award.

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[4]Utah Code Ann. § 78-31a-14(2) does permit a motion to vacate based on the procurement of an award by fraud within 20 days after the grounds are known or should have been known. The record contains no indication that Development raised its purported fraud arguments within 20 days after it discovered the claimed fraud.

See Robinson & Wells P.C. v. Warren,, 669 P.2d 844, 848 n.6 (Utah 1983). The Idaho Supreme Court has explained the expansive nature of such waiver:

> Cases decided under the Uniform Arbitration Act[5] make it clear that this statutory time limitation is strictly construed and must be complied with before a court can vacate any award. This is true even if the party seeking to vacate the award asserts a valid ground under the act.
>
> A court cannot exceed this [20-] day period. Because the time limit under the act is strictly construed, failure to comply with that time limit raises an absolute bar to a motion to vacate.

Bingham County Comm'n v. Interstate Electric Co., 105 Idaho 36, 665 P.2d 1046, 1049 (1983)(citations omitted)(emphasis provided by the court).

It makes no difference that Development did not file a pleading specifically called a "motion to vacate:"

> The pleading filed by appellant is denominated an answer, but we think in legal effect it may be regarded as a motion to vacate the award, since it affirmatively sets out reasons why such should be done and prays that the award be vacated and that plaintiff take nothing.

Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353, 355 (1932).

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[5]Utah, along with 33 other states, and the District of Columbia, has adopted the Uniform Arbitration Act. See 7 Uniform Laws Annotated, Uniform Arbitration Act, 1955 Act, Table of Jurisdictions Wherein Act Has Been Adopted (Supp. 1992), at p.1.

Similarly, the losing party to an arbitration in Chauffeurs, Teamsters, Warehousemen and Helpers, Local Union No. 135 v. Jefferson Trucking Co., Inc., 628 F.2d 1023, 1027 (7th Cir. 1980), cert. denied, 449 U.S. 1125 (1981), never filed a motion to vacate the arbitrator's award within the time prescribed for such motions. Later, the successful party moved to enforce the arbitration award. Only then did the losing party raise its grounds to vacate the award, not affirmatively, but as "defenses." The sole issue in Jefferson Trucking was whether the losing party could raise, as defenses, objections that were untimely under the section of the arbitration statute dealing with motions to vacate. In holding that the losing party could not raise such untimely objections as "defenses," the Seventh Circuit held:

> Since the defendant failed to file such a motion within the time period prescribed by the statute, we hold the defendant is therefore barred from prosecuting its claim to invalidate the award.
>
> The conclusion that the defendant is barred by the statute of limitations from now seeking to invalidate the award finds additional support in the federal policy favoring voluntary arbitration as the most expedient method of resolving labor disputes. . . . As the district court observed, this policy would seem to condemn the conduct of the defendant who ignored an award disfavorable to it, failed to move to vacate the award, and then sought to be given its day in court when the plaintiff brought suit in frustration to have the arbitration award enforced. If the defendant's defenses were of such vital

> importance to it, the defendant nevertheless had an opportunity to raise them in the manner contemplated by the statute.
>
> * * *
>
> Although the answer is not framed as a counterclaim, the "defenses" raised therein constitute a request for affirmative relief, namely, vacation of the arbitration award. A counterclaim for affirmative relief may not be asserted if barred by the statute of limitations.

(citations omitted).

Utah Code Ann. § 78-31a-12 provides, in part: "the court shall confirm the award unless a motion is timely filed to vacate or modify the award." (emphasis added). In this case, Development did not file a timely motion to vacate or modify the award. Its attempt was over five months late.

By using the word "shall" the statute explicitly required the trial court to enter an order confirming the Award. See, e.g., Varian-Eimac, Inc. v. Lamoreaux, 767 P.2d 569, 570 (Utah App. 1989)(when a statute uses the word "shall," the statute is mandatory). Because Development did not file a timely motion to vacate or modify the Award, this Court should affirm the trial court's order confirming the Award.

Even if, however, Development had timely raised any of its objections to the Award, which it did not, none of these objections has legal merit.

B. THERE IS NO COMPETENT EVIDENCE THAT THE ARBITRATOR'S AWARD WAS PROCURED THROUGH FRAUD.

At page 12 of its Brief, Development cavalierly asserts, without reference to the record, that two affidavits purportedly "created a material issue of fact as to whether [Trust] obtained the arbitration award through fraud." Development's assertion fails for two reasons.

1. Development Has Failed To Marshal Any Evidence.

Ordinarily, appellate courts concern themselves with the marshaling doctrine when an appellant does not marshal facts supporting the trial court's holding. See, e.g., State v. Larsen, 828 P.2d 487, 490-91 (Utah App. 1992). Marshaling requires an appellant to act as a "devil's advocate." It requires an appellant to "present, in comprehensive and fastidious order, every scrap of competent evidence" supporting the trial court's decision. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991). Development has failed to marshal the evidence supporting the trial court's ruling. As a result this Court presumes that the clear weight of the evidence supports the trial court's decision. See, e.g., State v. Christofferson, 793 P.2d 944, 947 (Utah App. 1990).

Moreover, Development has not marshaled any evidence in support of its own arguments. Nowhere in its Brief does

Development refer to a single point in the record that supports Development's factual assertions. Utah Appellate courts have repeatedly held they will not entertain appeals that lack adequate references to the record:

> "A reviewing court is entitled to have the issues clearly defined with pertinent authority cited and is not simply a depository in which the appealing party may dump the burden of argument and research." State v. Bishop, 753 P.2d 439, 450 (Utah 1988)(quoting Williamson v. Opsahl, 92 Ill.App.3d 1087, 1089, 48 Ill.Dec. 510, 511, 416 N.E.2d 783, 784 (1981)). The marshaling requirement provides the appellate court the basis from which to conduct a meaningful review of facts challenged on appeal. See Wright v. Westside Nursery, 787 P.2d 508, 512 n.2 (Utah App. 1990)(the purpose of the marshaling requirement is to spare appellate courts the onerous burden of combing through the record in search of supporting factual matters.)

State v. Larsen, 828 P.2d at p.491.

2. There is No Evidence in the Record to Support Development's Claim of Fraud.

Even if Development had marshaled all relevant evidence, there is no competent evidence in the record supporting Development's claim of fraud.

Development's own authority explicitly holds that affidavits such as the January 30, 1992 affidavit of Marc Kaplan (the "Kaplan Affidavit") are inadmissible:

> To raise a genuine issue of fact, an affidavit must do more than reflect the affiant's

> opinions and conclusions . . . The mere assertion that an issue of fact exists without a proper evidentiary foundation to support that assertion is insufficient to preclude the granting of a summary judgment motion.

Webster v. Sill, 675 P.2d 1170, 1172 (Utah 1983).

Development repeatedly contends the trial court overlooked "evidence" of fraud. Development fails to identify what "evidence" the trial court overlooked. In fact there was no such "evidence." The Kaplan Affidavit was rife with hearsay and unsupported conclusions. Utah appellate courts have long directed trial courts to ignore hearsay, opinions and factual statements lacking proper foundation when a party makes timely objections to objectionable portions of an affidavit. See, e.g., Salt Lake City Corp. v. James Constructors Inc., 761 P.2d 42, 46 (Utah App. 1988).

After Development filed the Kaplan Affidavit, Trust timely objected and requested the trial court to refuse to consider specified paragraphs of the Kaplan affidavit on grounds they were conclusory, lacked foundation, contained only his opinions and belief, were not admissible in evidence, and were insufficient as a matter of law to create an issue of material fact. (R. 83-84). Trust supported its objections with citations to relevant authority: Treloggan v. Treloggan, 699 P.2d 747, 748 (Utah 1985); Williams v. Melby, 699 P.2d 723, 725 (Utah 1985); Walker v. Rocky

Mountain Recreation Corp., 29 Utah 2d 274, 508 P.2d 538, 542 (1973). (R. 83).

Based on Trust's timely objections the trial court disregarded, as it should have, the objectionable portions of the Kaplan Affidavit. Cf., Hardy v. Hardy, 776 P.2d 917, 925 (Utah App. 1989). The trial court did not err in refusing to consider Development's conclusory, foundationless opinions and hearsay. There was no evidence of fraud before the trial court.

In addition, a court can vacate an arbitration award only if "the award was procured by corruption, fraud or other undue means;. . ." Utah Code Ann. § 78-31a-14(1)(a).

Development's pleadings nowhere prove or even suggest that Trust procured the Award through fraud. Trust's Summary of Dispute (R. 53) states it had received a $400,000 offer. Development's Summary of Dispute (R. 55) gave the reasons it believed this $400,000 offer was not bona fide. Development admitted that the parties had fully empowered the arbitrator to determine "whether the offer submitted by [Trust] in the sum of $400,000 was a bona fide offer establishing the fair market value" of Lot 37. (R. 40).

Development also admitted that at least since March of 1991, Trust had listed Lot 37 for sale for $588,500. (R. 40). Additionally, during the Hearing Development introduced into

evidence an exhibit showing the listed prices for Bald Eagle lots as of April 15, 1991. (R. 106). Trust's listing price for Lot 37 is the highest price shown for any lot in the Bald Eagle development. Another lot, Lot 11, is the same size as Lot 37, but was listed for only $435,000. (R. 106). The evidence at the Hearing therefore indicated that Trust was in fact attempting to maximize its recovery and minimize Development's financial obligation to Trust.

All this evidence was before the Arbitrator and the trial court. Based upon that evidence, the Arbitrator determined, within the scope of his authority, that the $400,000 offer received by Trust was a bona fide offer as of the date of the Hearing. Development has not raised a single admissible material fact demonstrating that the finding by the arbitrator was "procured by corruption, fraud or other undue means" as required by § 78-31a-14(1)(a).

Section 78-31a-14(1) permits a court to vacate an arbitration award only if certain actions occurred at the time of the arbitration. Development does not claim, and in good faith cannot claim, that any of the after-occurring events it relies on had any effect on the arbitration process itself, even if the record did contain any competent evidence of the facts asserted by

Development. As Trust showed above, the record lacks any such evidence.

3. Development Waived a Hearing.

Finally, Development complains that the trial court's refusal to grant a hearing provides some basis for reversal. Trust filed its Memorandum in Support of Motion for Judgment on the Pleadings on January 16, 1992. (R. 22). Development filed its memorandum opposing that motion on February 4, 1992. (R. 36). Neither party requested oral argument at the time it filed its principal memorandum. Trust filed its reply memorandum on February 10, 1992 (R. 80), with its counsel's affidavit of attorney fees. (R. 107). Trust also filed, on February 10, 1992, its Notice to Submit Motion for Decision (R. 120). On February 12, 1992, after the parties had filed all permitted pleadings, and Trust had filed its notice to submit, Development for the first time requested oral argument. (R. 115). On February 14, 1992 Development filed its objection to that request. (R. 117). Based on Trust's objection the trial court denied Development's untimely request.

Rule 4-501(3)(f), Utah Code of Judicial Administration, provides:

> If no written request for a hearing was made at the time the parties filed their principal memoranda, a hearing on the motion shall be deemed waived. (emphasis added).

Development's argument regarding "fraud" lacks merit. This Court should affirm the trial court.[6]

C. THE TRIAL COURT LACKED THE AUTHORITY TO CONSIDER TRUST'S DAMAGES.

1. <u>This Court Should Not Consider This Issue Due to Trust's Failure to Comply With Appellate Rules.</u>

Development now claims the trial court erred in not taking evidence <u>de novo</u> concerning Trust's damages. Development did not raise this issue in its docketing statement. Except perhaps inferentially, Development did not raise this point before the trial court. Moreover, Development's third issue fails to comply with Utah R. App. P. 24(a)(9), which requires an argument to contain "citations to the authorities, statutes, and parts of the record relied on." Development's two-paragraph discussion of this issue ignores this requirement.

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[6]In its summary of its argument for its Point I, Development apparently claims the trial court failed to allow Development "a reasonable opportunity to conduct discovery." Although Development did not develop this assertion in the Argument section of its brief, Trust does want to address it briefly. Development never requested any additional time to conduct discovery. Utah R. Civ. P. 56(f) provides the mechanism for requesting additional time for discovery. That rule, however, is not self-executing. A party seeking to avail itself of the Rule's benefits must affirmatively set forth the reasons why it needs additional time. <u>See generally, Callioux v. Progressive Ins. Co.</u>, 745 P.2d 838, 840-42 (Utah App. 1987). Development never invoked Rule 56(f) or requested an extension. It accordingly was entitled to none.

When an appellate brief fails to provide any legal analysis or citation to legal authority setting forth the applicable legal principles in support of an appellant's contention that summary judgment was improperly entered against it, the Utah Supreme Court declines to rule on that issue, and affirms the trial court. See, e.g., Graco Fishing v. Ironwood Exploration, 766 P.2d 1074, 1079 (Utah 1988). Similarly, this Court "has routinely declined to consider arguments which are not adequately briefed on appeal." State v. Yates, 189 U.A.R. 7, 9 (App. 1992). In such cases, this Court disregards the issue and affirms the order being appealed. See, e.g., Johnson-Bowles v. Division of Securities, 829 P.2d 101, 117 (Utah App. 1992).

2. This Court and the Trial Court Are Without Power or Authority to Review the Merits of the Award, Including Its Award of Damages.

The Utah Arbitration Act provide a method by which an arbitration award "may be given legal sanction and reduced to judgment by summary proceedings in the nature of a motion filed in court." Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353, 356 (1932)(emphasis added). Utah law favors arbitration as a speedy and inexpensive method of adjudicating disputes. To serve that policy, judicial review of arbitration awards is strictly limited

to statutory grounds and procedures. See Robinson & Wells, P.C. v. Warren, 669 P.2d 844, 846 (Utah 1983).

Under Utah Code Ann. § 78-31a-14(1), a court can vacate an arbitration award only on the following grounds:

> (a) the award was procured by corruption, fraud, or other undue means;
>
> (b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;
>
> (c) the arbitrators exceeded their powers;
>
> (d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of a party; or
>
> (e) there was no arbitration agreement between the parties to the arbitration proceeding.

A court is powerless to vacate an arbitration award on any other grounds. See Robinson & Wells, 669 P.2d at p. 847. None of these grounds permits judicial review of the merits of an arbitration award. This prohibition against judicial review of the merits of arbitration awards is rooted in the fundamental purposes of arbitration.

Parties employing arbitration have agreed that an arbitrator's award is final and binding. They have bargained for the decision of an arbitrator not a court. See, e.g., Morrison-

Knudsen Co., Inc. v. Makahuena Corp., 66 Hawaii 663, 675 P.2d 760, 766 (1983); Board of Educ. Posen-Robbins School Dist. v. Daniels, 108 Ill.App.3d 550, 64 Ill.Dec. 98, 439 N.E.2d 27, 30 (App. 1982); AFSCME Council 65, Local Union No. 667 v. Aitkin County, 357 N.W.2d 432, 436 (Minn. App. 1984); Ridley School Dist. v. Ridley Educ. Ass'n., 84 Pa. Commonwealth Ct. 117, 479 A.2d 641, 643 (1984).

The California Supreme Court recently explained the reason why arbitration awards are final and binding:

> The arbitrator's decision should be the end, not the beginning, of the dispute. . . . Ensuring arbitral finality thus requires that judicial intervention in the arbitration process be minimized. Because the decision to arbitrate grievances evinces the parties' intent to bypass the judicial system and thus avoid potential delays at the trial and appellate levels, arbitral finality is a core component of the parties' agreement to submit to arbitration. Thus, an arbitration decision is final and conclusive because the parties have agreed that it be so. By ensuring that an arbitrator's decision is final and binding, courts simply assure that the parties receive the benefit of their bargain.

Moncharsh v. Heily & Blase, 3 Cal.4th 1, 10 Cal.Rptr.2d 183, 832 P.2d 899, 903 (1992)(citations omitted) (emphasis in opinion).

Arbitration is not a mere prelude to litigation. See, City of Fairbanks Mun. Util. System v. Lees, 705 P.2d 457, 460 (Alas. 1985). The Kansas Supreme Court has explained why arbitration would be a futile, meaningless exercise if courts took it upon themselves to review the merits of an arbitration award:

> The reason an arbitration award will not be considered de novo by a court is if it were otherwise, arbitration would only then be a dress rehearsal for litigation rather than an alternative to litigation. As noted recently by the Vermont supreme Court in R.E. Bean Constr. Co. v. Middlebury Assoc., 139 Vt. 200, 428 A.2d 306:
>
> > "The courts must respect an arbitrator's determinations; otherwise, those determinations will merely add another expensive and time consuming layer to the already complex litigation process." 139 Vt. at 204-05, 428 A.2d 306.

Foley Co. v. Grindsted Prods., Inc., 233 Kan. 339, 662 P.2d 1254, 1262-63 (1983).

Almost 50 years ago, Judge Learned Hand identified the consequences of arbitration for parties who have agreed to arbitrate their dispute:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944).

Because arbitration is final and binding, reviewing courts in states such as Utah that have adopted the Uniform Arbitration Act

are prohibited from considering the merits of arbitration awards. [7] See e.g., Lees, 705. P.2d at p. 460 (Alaska); Arizona Public Serv. Co. v. Mountain States Tel. & Tel. Co., 149 Ariz. 239, 717 P.2d 918, 922-23 (App. 1985); Foust v. Aetna Cas. & Ins. Co., 786 P.2d 450, 451 (Colo. App. 1989); Harris v. Haught, 435 So.2d 926, 928 (Fla. App. 1983); Jackson Trak Group v. Mid States Port Auth., 242 Kan. 683, 751 P.2d 122, 127 (1988); Taunton Mun. Light Plant Comm'n v. Geiringer & Assoc., 560 F.Supp. 1249, 1252 (D. 1983), aff'd., 775 F.2d 664 (1st Cir. 1983)(applying Massachusetts codification of Uniform Arbitration Act); Byron Center Public Schools v. Kent County Educ. Ass'n., 186 Mich. App. 29, 463 N.W.2d 112, 113 (App. 1990); Beebout v. St. Paul Fire & Marine Ins. Co., 365 N.W.2d 271, 273 (Minn. App. 1985); Holman v. Trans World Airlines, 737 F.Supp. 527, 530 (E.D. Mo. 1989)(applying Missouri codification of Uniform Arbitration Act); Glasgow Education Ass'n. v. Board of Trustees, Valley County, 242 Mont. 478, 791 P.2d 1367, 1371 (1990); Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42, 45 (App.) disc. review denied, 317 N.C. 714, 347 S.E.2d 457 (1986); Greater Johnstown Area Vocational-Technical School v. Greater

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[7]The Uniform Arbitration Act is national in character and § 78-31a-14 is uniform with § 12 of the Uniform Arbitration Act. Accordingly, this Court relies on case law from other Uniform Arbitration Act jurisdictions to interpret the meaning and effect of § 78-31a-14. Cf., Power Systems & Controls, Inc. v. Keith's Elect. Const. Co., 765 P.2d 5, 10 n.2 (Utah App. 1988)

Johnstown Vocational-Technical Educ. Ass'n., 88 Pa. Commonwealth Ct. 141, 489 A.2d 945, 948 n.4 (1985).

As part of this prohibition against reviewing the merits of arbitration awards, courts cannot review an arbitrator's award of damages under the Uniform Arbitration Act:

> If the arbitrators in assessing damages commit an error of law or fact, but do not overstep the limits of the issues submitted to them, a court may not substitute its judgment on the matter.

City of Lawrence v. Falzarano, 380 Mass. 18, 402 N.E.2d 1017, 1024 (1980). See also, Foley Co. v. Grindsted Products Inc., 233 Kan. 339, 662 P.2d 1254, 1261-62 (1983)(interpreting Kansas and Maryland codifications of Uniform Arbitration Act); Seither & Cherry Co. v. Illinois Bank Bldg. Corp., 95 Ill.App.3d 191, 50 Ill.Dec. 672, 419 N.E.2d 940, 945 (App. 1981).

3. Neither This Court Nor the Trial Court Can Consider Evidence Not Before the Arbitrator.

Development seeks to vacate the Award based on new evidence not presented to the Arbitrator at the arbitration Hearing. In jurisdictions such as Utah that have adopted the Uniform Arbitration Act, courts refuse to vacate arbitration awards based on claims of new evidence. See, Flight Systems v. Paul A. Laurence Co., 715 F.Supp. 1125, 1129 (D.D.C. 1989)(applying Virginia codification of Uniform Arbitration Act). Cf., Shearson Hayden

Stone, Inc. v. Liang, 653 F.2d 310, 313 (7th Cir. 1981)(applying Federal Arbitration Act, 9 U.S.C. § 1 et seq.); Central Gen. Hospital v. Hanover Ins. Co., 49 N.Y.2d 950, 428 N.Y.S.2d 881, 406 N.E.2d 739, 740 (1980)(applying New York (non-Uniform) statutes). In short, when parties have agreed, as here, to arbitrate a dispute they "are bound by the arbitration award made upon the testimony before the arbitrator." Bridgeport Rolling Mills Co. v. Brown, 314 F.2d 885, 886 (2d Cir.), cert. denied, 375 U.S. 821 (1963)(emphasis added).

Brown is a short, but illuminating decision. The employer fired Brown because it suspected him of stealing materials. The arbitrator found the testimony against Brown to be "mere rumor and gossip," and ordered Brown reinstated. Id. at p. 885. After the arbitration award the employer sought to vacate the award based on new evidence that Brown perjured himself at the arbitration hearing. The employer claimed this resulted in a fraudulent award. Rejecting the employer's arguments the court held:

> That the employer at the time his motion was presented to the district court may have had, or may now have, sufficient evidence to justify a discharge of Brown for cause if he were now in the employer's employ is irrelevant to the issues the arbitrator heard and has no bearing upon the arbitrator's determination that the employer did not have just cause to discharge him in 1961. Brown's guilt, if now proved, does not require the conclusion that the arbitrator's award, when made, was procured by fraud, for the decision

> of the arbitrator was based upon the failure of the employer's proof to convince rather than on the strength of Brown's alleged perjurious testimony.

Id. at pp. 885-86. Accordingly, the Brown court affirmed the trial court's refusal to consider the employer's new evidence.

In American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448 (2d Cir. 1944), the parties had agreed to submit to arbitration a dispute concerning the damages a buyer of nuts suffered as a result of the seller's nondelivery. The arbitrator awarded the buyer specified damages, and the buyer petitioned the district court to confirm that award. The seller moved to vacate the award on the grounds there was no evidence regarding damages before the arbitrator other than a single statement in the brief of buyer's attorney. The district court denied seller's motion to vacate, and entered judgment on the award, holding that the mere claim for damages in the attorney's brief was adequate basis for the arbitrator's award of damages. Id. at p. 449. In affirming the trial court, Judge Learned Hand wrote:

> Had the parties at bar submitted evidence upon the issue of damages, and the arbitrators looked elsewhere, it might have been "misbehavior"; but it was not "misbehavior" to settle a controversy meant to be finally disposed of, by the only means open to the arbitrators, as the case stood.

Id. at p. 451.

Appellate courts, including the trial court, which essentially served in an appellate role in this case, cannot review evidence that was not introduced at the arbitration hearing. The cases make this clear. The trial court and this Court can consider only evidence presented to the arbitrator.

This prohibition against considering new evidence, moreover, is not unique to the review of arbitration awards:

> For the purpose of determining whether a verdict is or is not excessive, an appellate court will consider only the same evidence as was considered by the jury, but will not consider after trial facts presented to the appellate court by motion. Affidavits filled [sic] or obtained after the trial in the court below was completed may not be considered by the appellate court as part of the evidence in the case.

5. Am.Jur.2d APPEAL AND ERROR, § 736. See also, 5 C.J.S., APPEAL & ERROR § 1487 (matters occurring after ruling objected to will not be considered).

The trial court would have committed legal error if it considered after-occurring evidence not before the Arbitrator. Development does not dispute that the value of Lot 37 was the central issue decided by the Arbitrator. Even if the evidence at the Hearing was wholly lacking, or if Development may now have new

evidence,[8] this Court should affirm the trial court's Order and

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[8]As Trust has shown above, Development's arguments regarding new evidence are legally ineffective. They also are factually unsupported and do not indicate any "windfall" or injustice at all. As Trust argued to the trial court:

> [Development's] statement at p. 5 of its Objection [to the trial court's Order and Judgment] that the $400,000 price "has never been established to have been a good faith offer consistent to the fair market value of the property" is simply wrong. [Development] argued throughout the arbitration that the $400,000 figure was too low. The Arbitrator considered all the documents [Development] now parades before this Court. After considering [Development's] argument and these same documents, the Arbitrator specifically found the fair market value of the property was $400,000. The Court has now confirmed the Award containing that finding.
>
> As a result, [Development's] "windfall" argument is irrelevant. It is also inaccurate and misguided in the following respects: (1) it states--contrary to the record, and without any basis--that [Trust] <u>received</u> $570,000 for Lot 37; (2) it ignores all closing costs [Trust] incurred in a $570,000 <u>sale</u>;. . . (3) it ignores the fact that [Trust] has been paying property taxes on Lot 37 since June 23, 1989; and (4) it ignores the fact that [Trust] has either been paying interest on, or has lost the opportunity to invest, $442,200 since June 23, 1989.
>
> [Development's] argument does nothing more than encourage the Court to speculate. The court could just as easily speculate that if all of [Trust's] costs were considered, [Trust] has lost money. There is no reason for the Court to speculate at all, however. The Arbitrator heard all the evidence now urged by [Development] on this Court, and issued his Award ordering [Development] to pay [Trust] $188,500. The Award conclusively fixed [Development's] debt to [Trust] at $188,500. The Court confirmed that Award when it granted [Trust's] Motion for Judgment on the Pleadings.
>
> [Development's] Objection is its last desperate attempt

Judgment confirming the Award.

> to avoid the conclusive liability imposed almost a year ago by the Arbitrator on [Development]. The Objection is without any foundation in law, in reality, or in the record. It is contrary to the unambiguous language of the Arbitrator's Award. It is nothing more than a transparent and futile effort by [Development] to litigate this entire matter for the third time.

(R. 145-46).

> In addition, many things changed in the intervening ten months, including a dramatic reduction in interest rates. When interest rates fall, land prices typically rise.

D. THE ELECTION OF REMEDIES DOCTRINE HAS NOTHING TO DO WITH THIS CASE.

Development admits, as it must, that the purpose of the election of remedies doctrine is to prevent double recovery. This Court has recognized this rule:

> The doctrine of election of remedies is a technical rule of procedure and its purpose is not to prevent recourse to any remedy, but to prevent double redress for a single wrong. Angelos v. First Interstate Bank of Utah, 671 P.2d 772, 778 (Utah 1983)(quoting, Royal Resources, Inc. v. Gibraltar Financial Corp., 603 P.2d 793, 796 (Utah 1979)).

Robert Langston, Ltd. v. McQuarrie, 741 P.2d 554, 556 n.2 (Utah App.), cert. denied, 765 P.2d 1277 (1987).

The Utah Supreme Court explained the operation of the election of remedies doctrine:

> The doctrine of election of remedies applies as a bar only where the two actions are inconsistent, generally based upon incompatible facts; the doctrine does not operate as an estoppel where the two or more remedies are given to redress the same wrong and are consistent. Where the remedies afforded are inconsistent, it is the election of one that bars the other; but where they are consistent, it is the satisfaction that operates as a bar.

Farmers & Merchants Bank v. Universal C.I.T. Credit Corp., 4 Utah 2d 155, 289 P.2d 1045, 1049 (1955). When remedies are consistent, a party may permissibly pursue them singly or together until it has

one satisfaction. See Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399, 401 (1964).

This matter, however, does not involve a double recovery. It does not involve inconsistent remedies. Rather, it merely involves a judgment creditor's efforts to collect on an arbitration award. In this context, "[t]he doctrine of election of remedies does not apply to the successive steps taken by a judgment creditor to enforce his judgment." 28 C.J.S., ELECTION OF REMEDIES, § 3 at p. 1065. See also, Trahan v. Trahan, 455 A.2d 1307, 1312 (R.I. 1983)(judgment creditor can pursue distinct remedies simultaneously); Lipton v. Lipton, 211 Ga. 442, 86 S.E.2d 299, 302 (1955)(judgment creditor may concurrently pursue all available remedies to obtain satisfaction of judgment and neither can be pleaded in abatement of the other until judgment creditor receives full satisfaction.)

Development requested, and received from Trust, an additional 45 days after the date of the Award to repurchase Lot 37 for $588,500. Development did not take advantage of that extension. When Development's extension to repurchase Lot 37 for $588,500 expired, Trust was entitled, pursuant to the Award, to retain Lot 37, and to commence efforts to collect "$188,500 plus interest at

10% from March 28, 1991 until paid."[9] (Award, R. 101; Exhibit "D" to Addendum).

Consequently, Trust advised Development on July 16, 1991 that Trust had requested the escrow agent to liquidate the escrowed lots held for security so Trust could recover the $188,500 awarded it by the Arbitrator. (R. 64; Exhibit "F" to Addendum). Development can point to nothing in the record showing Trust ever received any proceeds pursuant to that request to the escrow agent.

When that effort to collect on the Award failed, Trust filed its Petition, still seeking to recover the same $188,500 awarded it

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[9]The Award did not give Development its choice between paying Trust $188,500 and repurchasing Lot 37 for $588,500. Rather, it ordered Development to pay Trust $188,500, but, in a proviso, gave Development seven days from the initial award within which to repurchase Lot 37 in lieu of making the ordered payment:

> Respondent, Marc Development, a corporation, is ordered to pay to Claimant, Arthur Mintz, Trustee of the Mintz Family Trust, $188,500 plus interest at 10% from March 28, 1991 until paid. Provided, however, in lieu of paying the foregoing award to Claimant, Respondent shall have the option of repurchasing Unit 37 of The Bald Eagle Club at Deer Valley from Claimant, on or before May 30, 1991 for $588,500.00 in cash, the burden of giving notice to Claimant of such election and arranging for closing being on Respondent. (R.101; Exhibit "D" to Addendum)

The Award could not have been clearer that it was an award of damages against Development, and that whether Development bought Lot 37 for $588,500, or paid Trust $188,500, Development was required by the Award to reimburse Trust in cash for the difference between the guaranteed price of Lot 37 ($588,500) and its fair market value on March 23, 1991 ($400,000).

by the Arbitrator. The trial court's confirmation of the Award did not permit Trust a double recovery. To the contrary, it only permitted Trust to treat the Award as a judgment, and to begin execution on the Award it received over a year ago, but on which it has yet to recover.

At page 14 of its brief, Development makes the puzzling assertion that Trust's request to the escrow agent had the effect "of forcing [Development] to repurchase the lot [37] rather than accept the monetary award of the arbitrator. As a consequence, [Trust] has waived the monetary portion of the arbitration award and, therefore, the award is null and void. . ." However, Development cites no authority or rationale for this assertion.

The building lot that was subject to the parties' agreement was Lot 37. (R. 50). The lots deposited into escrow, however, were lots 11, 12, 18 and 19. (R. 60). When Trust requested the escrow agent to liquidate the assets securing Development's performance, it requested a liquidation of Lots 11, 12, 18 and 19. Trust requested the liquidation so it could recover the monetary Award made by the Arbitrator. This action did not amount to waiver of the monetary portion of the Award. To the contrary, Trust stated in its July 16, 1991 letter (R. 64) that Development had forfeited any rights under the Award or the extension to reacquire

Lot 37. Trust accordingly sought to recover the monetary amount of the Award through sale of the escrowed security.

In addition, Development escrowed lots 11, 12, 18 and 19 "to secure the guaranty" of Development. Part of that guaranty was Development's promise to pay Trust the difference between $588,500 and the fair market value of Lot 37 as of March 23, 1991. (R. 5, 60; Exhibits "B", "C" to Addendum). Lots 11, 12, 18 and 19 therefore served as security for Development's debt to Trust. The Award merely liquidated the amount of the indebtedness Development assumed in its Letter of Guarantee, and ordered Development to honor the indebtedness it assumed in its Letter of Guarantee. (R. 5-6, Exhibit "B" to Addendum). The Utah one-action rule, Utah Code Ann. § 78-37-1, consequently required Trust to proceed first against Lots 11, 12, 18 and 19. This requirement of § 78-37-1 presents yet another reason why Development's interpretation of the election of remedies doctrine is incorrect.

Finally, as Trust has shown in the immediately preceding subpart of its Argument, a court can vacate an arbitration award only on statutory grounds. A court cannot vacate on any other grounds. Development asks the Court to vacate the Award based on events happening after the Hearing was over and the Award issued. Development makes no claim the arbitration procedure itself was flawed with respect to its election of remedies argument.

Development nowhere cites any statutory authority for this election of remedies argument, and none exists.

The doctrine of election of remedies does not apply under these circumstances. It consequently provides no basis for reversal of the trial court.

VIII. CONCLUSION

Appellee respectfully urges this Court to **AFFIRM** the trial court's Order and Judgment.

DATED September 30, 1992.

Respectfully submitted,

ANDERSON & WATKINS

Bruce Wycoff

Glen D. Watkins
Bruce Wycoff

Attorneys for Appellee

CERTIFICATE OF DELIVERY

I hereby certify that I hand-delivered four copies of the above and foregoing Appellee's Brief to Mr. Thomas T. Billings and Mr. Jon E. Waddoups, VanCott, Bagley, Cornwall & McCarthy, 50 South Main Street, Suite 1600, Salt Lake City, Utah 84145 this 30th day of September, 1992.

Bruce Wycoff

(k:min91089\0923APEE.BRF)

IN THE UTAH COURT OF APPEALS

ARTHUR MINTZ, Trustee of the Mintz Family Trust,	)	**Case No. 920571-CA**
Petitioner-Appellee,	)	
vs.	)	Priority 16
MARC DEVELOPMENT, an Illinois corporation,	)	
Respondent-Appellant.	)	

ADDENDUM

A. March 25, 1992 Order and Judgment

B. June 23, 1989 Letter of Guarantee

C. July 1989 Deposit in Escrow

D. May 30, 1991 Amended Award of Arbitrator

E. May 29, 1991 Extension Agreement

F. July 16, 1991 Notice of Default

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IN THE THIRD JUDICIAL DISTRICT COURT OF SUMMIT COUNTY

STATE OF UTAH

ARTHUR MINTZ, Trustee of the Mintz Family Trust, Petitioner, vs. MARC DEVELOPMENT, a corporation, Respondent.	**ORDER AND JUDGMENT** Case No. 11174 Judge Homer Wilkinson

The Petitioner having filed its Motion for Judgment on the Pleadings on January 16, 1992; the Respondent having filed its Memorandum in Opposition; Petitioner having filed its Reply Brief; the Court having considered the moving papers, being fully advised therein, having issued its Memorandum Decision dated February 19, 1992, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Petitioner's Motion for Judgment on the Pleadings is granted.

2. The May 30, 1991 Arbitration Award, which is the subject of the Petition herein, is confirmed.

3. Judgment is entered in favor of Petitioner and against Respondent in the principal amount of $188,500, together with

> Interest from March 28, 1991 through February 24, 1992 in the amount of $17,197.40;
>
> Interest at the rate of $51.64 per day from February 25, 1992, until the date of entry of this Order and Judgment; and
>
> Interest from and after the entry of this Order and Judgment at the rate of 12% per annum, until paid.

4. Attorneys' fees as allowed by arbitration statutes are awarded subject to objection by the Respondent and review of the Court.

JUDGMENT RENDERED this 24 day of March, 1992.

BY THE COURT:

Homer F. Wilkinson
District Court Judge

CERTIFICATE OF SERVICE

On this 24th day of February, 1992, I hereby caused to be telecopied, a true and accurate copy of the foregoing **ORDER AND JUDGMENT**, to the following:

Thomas T. Billings, Esq. (801) 534-0058
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
50 South Main Street, Suite 1600
P.O. Box 45340
Salt Lake City, Utah 84145
Attorneys for Respondent

Daylene L. Sargent

CLERK'S MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing **ORDER AND JUDGMENT**, postage prepaid, via the U.S. mail, on the 26 day of Mar., 1992, addressed to the following:

Thomas T. Billings, Esq.
VAN COTT, BAGLEY, CORNWALL & MCCARTHY
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Attorneys for Petitioner

Joyce D. Ouard, Deputy Clerk

(R:MIN91089\02240&J.35A)

Letter of Guarantee

To: Mintz Family Trust DTD 7-7-88
Arthur M. Mintz, Trustee
50 Foxhill
Woodside, California 94062

From: Mark Kaplan
Marc Development
Bald Eagle Club
Park City, Utah 84060

In reference to our recent discussion regarding the Bald Eagle Club and your Homesite choice of # 37, Mark Kaplan and Marc Development hereby agree to the following:

1. You shall receive an 8% discount from the published price for you Homesite as indicated in the attached Exhibit A.

2. You shall receive an additional discount from said price noted above in the amount of $50,000.

3. If at any time during the 20 months from the date of closing, any price reduction from the original price list that is offered to any other lot purchaser, the same price reduction shall be granted to you.

4. In addition, you shall be guaranteed herein the following at the end of 20 months from the date of closing:

1. The lot shall be deemed to be worth 10% above the original published price in Exhibit A by virtue of the following:

a. Purchaser shall build or keep said lot.

b. Seller shall have the obligation and option to pay the difference between Buyer's sale price at that time and the 10% increase price as indicated below, or,

c. at the Seller's option, Seller shall be obligated to purchase the lot for said amount of the guarantee indicated below.

Original Price List Exhibit A for Lot # 37 is $ 535,000.

Final Special Discount Price: $ 442,200.

Guaranteed Price at the end of 20 months: $ 588,500.

DEPOSITION EXHIBIT 7

In order to guarantee that funds shall be available to support the above guarantees, Seller hereby agrees to deed into escrow with High Country Title Company, the deeds to four Bald Eagle Homesites free and clear of all encumbrances to inure to the benefit of the Buyers, the payment of said guarantees. These homesites shall be transferable and nonexlusive so that a minimum of four homesites shall always remain in escrow throughout the 20 month period.

Entered into this 23rd day of June 1989.

Marc Development, Seller

President

Arthur Mintz, Trustee,
Mintz Family Trust DTD 7-7-88

Trustee

DEPOSIT IN ESCROW

The undersigned Mare Development, Inc., an Illinois Corporation (Depositor), does hereby deposit into escrow with High Country Title Company, a Utah Corporation and a title agency, of Park City, Utah (Trustee), fee title, free and clear of encumbrances, to Units 11, 12, 18, and 19 inclusive, of the Bald Eagle Club at Deer Valley, a Utah Expandable Condominium Project, (The Condominium Project) as recorded in the Office of the County Recorder of Summit County, State of Utah, on August 3, 1989 as Entry No. 311266, in Book 330, beginning at Page 295, and pursuant to Record of Survey Map recorded on August 3, 1989 as Entry No. 311265 * (The Trust Property). The terms and conditions of the Trust are as follows:

1. The Trust Property is deposited to secure the guaranty of Depositor with regard to no more than ten units contained in the Condominium Project. At the present the guaranty applies to Units to be purchased by the persons indicated below:

1. Unit 37 - Arthur Muntz, Trustee
2. Unit 38 - Charles Gibson
3. Unit 5 - Neil and Jane Parry
4. Unit 36 - James and Susan Swartz
5. Unit 29 - Russell and Dawn Nelson
6. Unit 28 - Tom and Grey Gust
7. Unit 34 - John J. and Christy K. Mack
~~8. Unit 6 - Steven S. Raitz~~

The foregoing individuals are indicated as beneficiaries. A copy of the Guaranty between Depositor and each of the individual beneficiaries is attached hereto and incorporated herein as information and direction to the Trustee.

2. Depositor shall have a Right of Substitution with regard to the Trust Property such that if Depositor, in its sole discretion, should determine that it desires release from the Trust of one or more of the Units constituting the Trust Property, Depositor may receive such release immediately upon the deposit by Depositor in Trust under the terms and conditions of this Deposit in Escrow of another unit in the Condominium Project, free and clear of encumbrances. At all

*In the office of the Summit County Recorder and recorded August 3, 1989 as Entry No. 149483 in Book 210 at Page 389 and the Record of Survey Map recorded August 3, 1989 as Entry No. 149482 in Book 210 at Page 359 of the official records in the office of the Wasatch County Recorder.

times during the terms of this Trust, four units in the Condominium Project, free and clear of encumbrances, shall remain in the escrow.

3. The term of this Escrow commences on the date hereof and shall exist for a period of thirty six (36) months unless earlier terminated by agreement signed by Depositor and the beneficiaries hereof. The beneficiaries agree that they will sign an agreement terminating the Escrow at any time that there remains no longer at issue any of the obligations under the individual Letters of Guaranty applicable to the particular beneficiary. Notwithstanding the foregoing, the Escrow shall continue during any periods that the Trust Property in the Escrow is under litigation, until such litigation is complete and nonappealable.

4. The Trustee shall respond to the draw-down by a particular beneficiary with regard to the Trust Property if the beneficiary sends to the Trustee during the term of the Escrow, a written Affidavit that (1) Depositor became obligated under the terms and conditions of beneficiary's Letter of Guaranty to pay sums to beneficiary, (2) Beneficiary made demand upon Depositor for the payment of such sums pursuant to the Letter of Guaranty, (3) Thirty days have elapsed from the demand upon Depositor and Depositor has failed to pay the sums owed beneficiary under the Letter of Guaranty. When Trustee receives such a demand by Affidavit from a beneficiary, Trustee shall immediately transmit a copy of such demand to Depositor, and if Depositor fails to satisfy beneficiary, unless otherwise enjoined by a competent court of law, fifteen days after the mailing of such beneficiary's demand to Depositor, Trustee shall place on the market for sale by suitable real estate listing, all of the Trust Properties and from the first proceeds from the sale of the first unit to be sold and closed of the Trust Properties, shall pay the demand of the demanding beneficiary, as indicated by his Affidavit.

5. As soon as all beneficiary demands and potential demands have been met by Trustee, or as soon as the term of the Escrow expires without demand by beneficiaries, all remaining Trust Properties shall be conveyed by Trustee's Deed back to Depositor and the Escrow closed.

6. Trustee shall have the obligations of reasonable care with regard to the Trust Properties and the terms and conditions of this Escrow but, with the exception of gross negligence or willful damaging acts, Trustee shall not be

liable to Depositor or to the beneficiaries or any of them with regard to the Escrow Agreement and/or the Trust Property.

DATED this _____ day of July, 1989.

MARC DEVELOPMENT, INC., an Illinois Corporation

By _____
Mark Kaplan, President

The Terms and Conditions of Escrow accepted. Title to the foregoing Trust Property having been conveyed to Trustee is acknowledged.

HIGH COUNTRY TITLE COMPANY

By _____
Wallace Buchanan, President

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071189

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

Arthur Mintz, Trustee of the Mintz
Family Trust, Claimant
-and-
Marc Development, a corporation, Respondent

CASE NUMBER: 81 115 0017 91

AMENDED AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named parties, and dated July 20, 1989, and having been duly sworn and having duly heard the proofs and allegations of the parties, FIND and AWARD as follows:

Respondent, Marc Development, a corporation, is ordered to pay to Claimant, Arthur Mintz, Trustee of the Mintz Family Trust, $188,500.00 plus interest at 10% from March 28, 1991 until paid. Provided, however, in lieu of paying the foregoing award to Claimant, Respondent shall have the option of repurchasing Unit 37 of The Bald Eagle Club at Deer Valley from Claimant, on or before May 30, 1991 for $588,500.00 in cash, the burden of giving notice to Claimant of such election and arranging for closing being on Respondent. If Respondent shall exercise this option, each party shall pay the closing costs customarily allocated to buyer and seller, as applicable, but no real estate commission shall be payable by Claimant. Claimant shall cooperate in effecting such a closing.

The administrative fee and expenses of the American Arbitration Association shall be borne by Respondent and paid as directed by the American Arbitration Association. Each party shall bear their own expenses.

This Award is in full settlement of all claims submitted to this arbitration.

Dated this 30th day of May, 1991.

Gregory S. Bell, Esq. Arbitrator

MARC Construction & Development Corporation

1629 Colonial Parkway Inverness, Illinois 60067 (708) 359-6024 Fax 708 359 5448

May 29, 1991

Mr. Arthur Mintz
50 Foxhill
Woodside, California 94062

Dear Arthur:

This letter will serve as an agreement between Marc Development and Arthur Mintz for Marc Development to purchase Lot 37 in the Bald Eagle Community of Deer Valley for the purchase price of $588,500. The closing will take place on or before July 15, 1991, and interest will be paid from May 30, 1991, at the rate of 2 points over Harris Bank of Chicago's prime rate until the closing takes place. All customary closing costs will be paid by the respective parties. TAX PRORATIONS ASSUME CLOSING DATE 5-30-91.

In addition, it is agreed that the property will be listed for sale on the market immediately with Janet Olch at a price to be determined by Marc Development.

Sincerely,

Mark O. Kaplan
President

MOK:keo

Agreed by: _____ Trustee, MINTZ FAMILY TRUST

Date: MAY 30, 1991

Arthur M. Mintz
Attorney at Law

50 Foxhill
Woodside, California 94062
(415) 851-1883 Res.
(415) 851-8767 Off.

July 16,1991

Mr. Mark O. Kaplan
Marc Development
1629 Colonial Parkway
Inverness, Illinois 60067

NOTICE OF DEFAULT AND BREACH OF AGREEMENT

You are hereby notified that pursuant to the Arbitration Award of the American Arbitration Association dated May 30, 1991, and your subsequent letter agreement of May, 1991 extending the terms for your payment for Lot #37, Bald Eagle Development, you are in default in the purchase contemplated in our above agreements.

All necessary documentation, deeds, title insurance and closing statements were available for the closing with High Country Title Company.

Accordingly, please be advised that your failure to honor the above described payment committments has resulted in substantial damage and inconvenience to the Mintz Family Trust which was entitled to rely on your promise to pay.

By your failure to comply with your agreement, you have forfeited any rights to reacquire Lot #37, and are responsible for payment of $188,500 plus interest to July 15,1991 of $7724, plus interest on $188,500 from July 15,1991 to the date this debt is paid, plus whatever additional costs and legal fees may be incurred as a result of your default.

I have advised High Country Title of this situation, and requested, pursuant to the Deposit in Escrow, that they place for sale the four lots held by them to protect beneficiaries , and to apply the first recovered proceeds of a sale to the above described amounts due the Mintz Family Trust.

This notice is not intented to excuse any action for damages resulting from your default or breach of Contract.

MINTZ FAMILY TRUST dtd 7-7-88

By _____
ARTHUR M. MINTZ, Trustee